No. 8413

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MRS. ADAH ALBERTY, trading as Alberty Food Laboratories,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

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SUBJECT INDEX

CITATIONS AND AUTHORITIES

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Abstract of Evidence for Plaintiff

The information, in ten counts, filed October 31, 1934 (Tr., p. 23), alleges the shipment by appellant from Los Angeles, California, to various cities in other States, during the period from March 25, 1932, to April 5, 1933, of three articles of drugs charged to have been mislabeled; namely, Alberty's Calcatine, Alberty's Liver Cell Salts, also named Alberty's Lebara Organic Pellets, and Alberty's Anti-Diabetic Vegetable Compound Capsules.

The shipment in interstate commerce of the labeled articles of drugs as charged in each of the counts, was stipulated to. (Tr., p. 38.)

The drug involved in the first count of the information, Alberty's Calcatine, was labeled as follows:

CHIEF REMEDY FOR THE GROWING ORGANISM AND FOR CORRECTING CONSTITUTIONAL DEFECTS	ALBERTY'S CALCATINE A Cell and Tissue Salts App. 250 Pellets	DOSAGE Take 3 pellets every 2 hours for first 30 days then 3 pellets before meals. Dissolve on the tongue. Babies—1 pellet in each bottle.

USES—Acidosis, indigestion, calcium starvation, diarrhea, brain irritation, teething children. A TONIC after acute diseases and for constitutional weaknesses, emaciation, bone diseases, scrofulous and tubercular tendencies.

Alberty's Food Laboratories
Los Angeles

(Govt. Ex. 1.)

The second count is based upon the article, Alberty's Liver Cell Salts, the label upon which was as follows:

FOR MALARIAL DISORDERS BILIOUS-NESS AND DISEASES OF THE LIVER, URIC ACID DIATHESIS	ALBERTY'S LIVER CELL SALTS	Take 3 pellets every two hours for the first 30 days, then take 3 pellets before each meal and on going to bed. Dissolve on the tongue.

USES—Ailments marked by excessive secretions of bile and derangement of the liver, gravel, sand in the uterine, biliousness, headache with vomiting of bile, bitter taste, diabetes, trouble arising from living in damp places, malaria, gout.

ALBERTY FOOD LABORATORIES
328 W. H. Hellman Building,
Los Angeles

(Govt. Ex. 2.)

The third count concerns Alberty's Calcatine, and a slightly different label thereon, reading as follows:

DOSAGE	ALBERTY'S CALCATINE	DOSAGE
Take 3 pellets every 2 hours for first 30 days then 3 pellets before meals.	Different Elements Organic Calcium App. 250 Pellets	Take 3 pellets every 2 hours for first 30 days then 3 pellets before meals.
Dissolve on the tongue.		Dissolve on the tongue.
Babies—1 pellet in each bottle.		Babies—1 pellet in each bottle.

Calcium elements combined in an organic form. Especially useful in Calcium Deficiency.

AIDS acidosis, teeth, bones, etc. May be taken indefinitely with benefit.

Alberty's Food Laboratories
729 Seward St.—Hollywood, Calif.

(Govt. Ex. 3.)

Count four is based upon the same article of drugs and labeling as count three.

Count five concerns Alberty's Liver Cell Salts or Lebara Organic Pellets, the label upon which read as follows:

THESE	ALBERTY'S	Take 3 pellets
PELLETS	LEBARA	every two hours
MAY BE	ORGANIC	for the first 30
USED	PELLETS	days, then take 3
INDEFINITELY	Formerly	pellets before each
WITH	LIVER CELL	meal and on going
BENEFIT	SALTS	to bed.
		Dissolve on the tongue.

App. 250 Pellets

Aid Acidosis, Dormant Liver, Bile Secretions, Clearing the Complexion. Not a Laxative.

Alberty Food Laboratories
729 Seward St.—Hollywood, Calif.

(Government's Ex. 5.)

Counts six and seven are based upon the same article of drugs and labeling as count three.

Counts eight, nine and ten are based upon the article of drugs, Alberty's Anti-Diabetic Vegetable Compound Capsules, labeled as follows:

ALBERTY'S
Anti-Diabetic
Vegetable Compound Capsules
Fifty-four 00 Capsules, 9 Days' Treatment
Price $1.50
Dosage: Take 2 Capsules just after each meal
Manufactured for
The Alberty Food Laboratories
729 Seward St., Hollywood, Calif.

(Government's Ex. 8.)

Analysis of Alberty's Calcatine showed it to consist almost entirely of milk of sugar, with 14/100 of 1% of ash, the ash being calcium phosphate and traces of impurities in sugar of milk (Tr., p. 79). Analysis of Alberty's Liver Cell Salts disclosed the article to have substantially the same chemical content as the Calcatine (Tr., p. 81).

According to the expert medical testimony on the part of the Government, the amount of calcium phosphate contained in the products was infinitesimal. The calcium and the other elements shown by the analyses were all to be found in milk; a few drops of milk would be the equivalent of one of the tablets (Tr., p. 85); one teaspoonful of milk would contain eight times as much calcium and twelve times as much phosphorus as 25 or 30 of the

tablets; a person would have to take from 25,000 to 50,000 tablets a day to approach what is normally taken in with food (Tr., p. 108).

By the testimony of Drs. Clinton H. Thienes and Egbert E. Moody, allopathic physicians, Alberty's Calcatine in the dosage prescribed on the labels was valueless as a remedy for the growing organism or for correcting constitutional defects, and was valueless in the treatment of acidosis, indigestion, calcium starvation or deficiency, diarrhea, irritation of the brain, teething in children, constitutional weakness, emaciation, bone diseases, scrofula, or tubercular tendencies, and was valueless as a tonic or as an aid to the teeth or bones (Tr., pp. 84-8, 116-8).

Likewise, the testimony of Dr. Thienes and Dr. Howard F. West, the latter also being an allopathic physician, showed Alberty's Liver Cell Salts, or Lebara Organic Pellets, in the dosage prescribed on the labels, to be valueless in the treatment of malaria or malarial disorders, biliousness, diseases of the liver, uric acid diathesis, ailments marked by excessive secretions of bile or derangement of the liver, gravel, sand in the uterine, headache with vomiting of bile, bitter taste, diabetes, trouble arising from living in damp places, gout, acidosis, dormant liver, or bile secretions, or for clearing the complexion (Tr., pp. 88-93, 108-9).

The testimony of these physicians represented the consensus of medical opinion. (Tr., pp. 96, 112.)

Dr. Edward P. Clark, homeopathic physician, testified that Alberty's Calcatine and Alberty's Liver Cell Salts were valueless in the treatment of each of the ailments

aforesaid in the vast majority of cases (Tr., pp. 51, 53); that while Alberty's Calcatine was the same thing as the homeopathic remedy, calcarea-phos, and Alberty's Liver Cell Salts the same as the homeopathic remedy, natrum-sulph (Tr., p. 54), there was no such thing in the practice of homeopathy as there being any particular product for an individual disease (Tr., p. 50); that the homeopaths prescribe for the disease according to the symptoms that the patient has at the time; that the remedies are selected according to the symptoms of the patient and not according to the disease (Tr., p. 49); that Alberty's Calcatine would not be indicated in one case in a thousand of the diseases mentioned on the labels; that "the peculiarity of the homeopathic prescriptions is that you have got to investigate every case"; and that advertising a remedy of such kind as Calcatine as a cure for the diseases specified on the Calcatine label produces a great deal of harm, because it gives the patient confidence that this remedy is going to cure him (Tr., p. 51), and the patient neglects to take the proper remedies that might help him (Tr., p. 52); that the same statements would apply to the drug, Alberty's Liver Cell Salts or Lebara Pellets, and to it being useless in the treatment of the diseases named on the Lebara Pellets label (Tr., pp. 52-3); that his testimony represented the consensus of homeopathic medical opinion (Tr., p. 55).

Dr. Hovey L. Shepperd, homeopathic physician who testified for the defendant, on cross-examination testified that the homeopaths prescribe for individuals and not for diseases; that there is no such thing as any particular

drug for a disease—that is, no drug will cure every case of pneumonia or every case of typhoid; that the homeopaths examine the patient to determine his symptoms and pick out the particular homeopathic drug that fits closest to the conditions of the patient, both objective and subjective symptoms; that ten persons with colds might get ten different remedies; that there is no one remedy that will cure every disease or any single disease; that it is not practice according to the tenets of homeopathy to prescribe without the symptoms being known to the physician (Tr., pp. 152, 153).

Analysis of Alberty's Anti-Diabetic Vegetable Compound Capsules showed the capsules to contain a dry vegetable mixture (Tr., p. 79), consisting largely of powdered leaf, root, and possibly some seed and seed tissues (Tr., p. 82). By the testimony of Drs. Thienes and West, the Anti-Diabetic Vegetable Compound Capsules were not effective in the treatment of diabetes (Tr., pp. 93-5, 109).

Appellant bought the two homeopathic remedies, calcarea-phos and natrum-sulphuric, in bulk from a homeopathic pharmacy, and sold them as Alberty's Calcatine and Alberty's Liver Cell Salts (Tr., pp. 140, 142, 189).

The prosecution was only instituted after appellant had persisted in mislabeling and shipping the drugs after she had been repeatedly informed and warned by officials of the Food and Drug Administration that her claims for Calcatine and Liver Cell Salts were false and highly objectionable (Tr., pp. 45, 57-61).

In February, 1932, she was advised by Dr. George W. Hoover, consulting chemist of Washington, D. C., and formerly connected with the Federal Food and Drug Administration, that statements of the kind appearing on the labels upon which the prosecution was based, were in violation of the Food and Drugs Act or would be so regarded by the officials, and that unless she made drastic and radical changes in her literature, the Government officials would probably seize her goods and institute a criminal action (Tr., pp. 71, 72).

Reply to Argument That Evidence is Insufficient to Support the Verdict

Appellant argues that the prosecution did not "prove beyond a reasonable doubt that the defendant was guilty of the violations charged" (App. Br., p. 75), by which we suppose it is meant to be contended that the evidence was not sufficient to support the verdict.

The question of the sufficiency of the evidence is not before the court since there was no motion at the trial for a directed verdict (*Love v. United States* (C. C. A. 9), 74 F. (2d) 988).

Howsoever, the foregoing summary shows that there was abundant evidence that the statements on the labels were both false and fraudulent, the two respects in which appellant claims the evidence is lacking.

Appellant argues that the branding upon the Calcatine and Liver Cell Salts bottles did not misrepresent; that the labels did not state that the drugs were a cure for the

diseases listed thereon, but merely employed the noun, "uses," and the verb, "aids," in connection with the names of the diseases. Also, that the word "Anti-Diabetic" on the Vegetable Compound label was not a statement regarding the curative or remedial effects of the product.

The naming of the diseases on the labels is properly to be construed as a representation that the drugs were a cure or remedy for such diseases. *Hall v. United States,* 267 Fed. 795, 797, concerned a label which stated that the drug involved was "for" certain specified ailments, and as here, gave directions for using the article. The court said:

> "Language used in the label is to be given the meaning ordinarily conveyed by it to those to whom it was addressed. When so read and construed, it amounted to an assertion that the article referred to, if used as directed, might be expected to have a curative or alleviating effect on the classes of ailments mentioned * * *. It cannot with any plausibility be contended that there was an absence of evidence to support a finding that the plaintiff in error put the articles in question into the channels of interstate trade, labeled as a cure or remedy for stated classes of ailments; * * *."

To the same effect are:

Bradley v. United States, 264 Fed. 79, 81;

Eleven Gross Packages, etc. v. United States, 233 Fed. 71, 73.

Reply to Argument That Court Erred in Allowing Appellant's Collateral Literature in Evidence

Appellant's main contention is that the trial court erred in admitting into evidence a booklet, "Calcium the Staff of Life" (Govt. Ex. 10), and a book, "The Hour Glass—What Time Does to Us" (Govt. Ex. 11), of which publications appellant was the author. This literature contained misrepresentations about appellant's products and was distributed by her at so-called "Health Food" stores throughout the United States where her drugs were sold.

The assignments of error relied upon appear under the heading in the brief, "Specification I," and are numbered 3, 4, 5, 9, 10, 11, 12, 13, 14, 17, 18, 19, and 20 (App. Br., pp. 39-52).

The false representations made by appellant in the exhibits aforesaid were competent and proper evidence to establish that the misstatements upon the labels were made by her with fraudulent intent. By the statute upon which the prosecution is based, misbranding of an article of drugs is defined as occurring when the package or label,

> "shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent."
>
> 21 *U. S. C.*, Sec. 10, Par. 3.

The intent to defraud in making the statements appearing upon the labels is an essential element of the charge, and may be shown by the facts and circumstances.

Seven Cases v. United States, 239 U. S. 510, 517.

Albert J. Brown, Chief Inspector for the Western District of the Food and Drug Administration, testified in substance as follows:

> I was stationed at Portland, Oregon, from 1921 to 1932, and in Seattle, Washington, from 1932 to 1935; I have been familiar with the pamphlet, 'Calcium, the Staff of Life, by Adah Alberty,' of the kind as Government's Exhibit 10, since 1930 or 1931; it was a pamphlet that was on the counters for distribution at places that stocked Alberty's foods (Tr., p. 41, lines 7-17); about the year 1931 I saw these books in a dozen or more places that stocked so-called health foods, especially places that stocked Alberty's foods, for retail trade, at various cities, principally in Seattle and Portland (Tr., p. 41, lines 24-27); the pamphlets were usually on the counter; in some of those places there is a little box for free distribution and it says 'Take One'; it was always on the counter for distribution (Tr., p. 43, lines 13-16).
>
> I have seen the kind of book 'The Hour Glass—What Time Does To Us,' by Adah M. Alberty (Govt. Ex. 11); I became aware of it practically at the same time I was aware of the other booklet because Mrs. Alberty was the author of 'The Hour Glass,' and then in some places where I have been in they have literature and a bracket saying that this book was for sale (Tr., p. 43, lines 20-26).

George P. Larrick, Chief Inspector of the Food and Drug Administration, testified in substance as follows:

> I know Mrs. Alberty and on September 4, 1934, at my office in Washington, D. C., I had a conversation with her concerning books of the kind as Gov-

ernment's Exhibit 11; Mrs. Alberty called at my office protesting against certain action that the Government had instituted, or was planning to institute to her knowledge, against her products; during the course of that conversation I pointed out to her in great detail, why the Government was bringing this action, and during the time of that conversation I displayed this book to her and read numerous portions of it to her to show that certain of the claims there were the basis of the action that we were bringing and certain of the claims which the Government had repeatedly told her were not justified in fact; I also discussed this little booklet with her and pointed out to her that this booklet contained many statements, descriptions and devices which, in the opinion of the Administration, were grossly in violation of the law; she agreed with me that she did use these booklets, generally, throughout the United States in health food stores in connection with the sale of her products and also that the booklet, 'The Hour-Glass—What Time Does to Us,' was on sale in a great many of these so-called health food stores throughout the country and that the book does make numerous statements telling how the medicines are to be used and what they are to be used for; in fact, explaining many of the things that appear on the labels of this product (Tr., pp. 44-5).

It thus appears that Government's Exhibits 10 and 11 were made use of by appellant before the times of commission of the offenses charged.

Representations in Government's Exhibit 10 included the following:

"June, since the age of two years, had not been robust. She grew slowly, had no appetite and suffered from malnutrition. Between the ages of 12 and 13 she had not gained any weight and grew less than one inch in height. At the age of 13 she started on the Alberty Treatment and gained seven pounds in weight and grew one inch in height in two months.

"In one year June had grown three inches in height and gained 16 additional pounds." (Govt. Ex. 10, p. 45; Tr., p. 43.)

Dr. Moody, who was a pediatrician, testified that Alberty's Calcatine would have been of no aid whatsoever in the treatment of the child's condition (Tr., p. 121).

In Government's Exhibit 11 appellant stated:

"How the human race became calcium-starved.

"Naturally you will ask, 'How did I become calcium-starved?'

"Calcium starvation may be brought about in a number of ways. To begin with, the majority of babies are now born calcium-starved and the deficiency has never been made up. Statistics show that 91 per cent of all the babies born are calcium-starved.

"A few generations ago, it was only the premature infant that was born deficient in calcium.

"The foetus is a 'calcium parasite' because it requires a large amount of this element, and, in order to obtain it, it draws upon the maternal tissues in a way that often seriously improverishes the mother, and even at that, fails to get all it needs and consequently it is born calcium-starved." (Govt. Ex. 11, p. 145; Tr., p. 77.)

Dr. Moody testified that in his opinion the statements were incorrect (Tr., pp. 122-3).

In Government's Exhibit 11 appellant further represented:

> "Syphilis—Inherited—Babies.
>
> "When a baby is born with inherited syphilis it can be eradicated in a short time, if taken in the early months of life.
>
> "The mother's milk is rarely indicated in such cases, even though she herself may have escaped, as her blood more or less is affected.
>
> "These babies should be placed on Alberty's Food as soon as possible, as results will be more pronounced when metabolism is at the maximum, than when the child gets older.
>
> "Alberty's Calcatine should invariably be used in conjunction with Alberty's Food. No orange or prune juice should be given." (Govt. Ex. 11, p. 231; Tr., p. 78.)

Dr. Moody testified that the representations that Calcatine would be of aid in the treatment of a baby with inherited syphilis were false (Tr., p. 123).

Appellant further stated in Government's Exhibit 11 the following:

> "Calcatine.
>
> "Calcium is essential to health and long life.
>
> "Alberty's Calcatine helps to offset acidosis and 'speeds up' cell reproduction by supplying a base for the new cells. While Alberty's Food supplies the body with its daily need of calcium, the more calcium

supplied, the sooner one will recover health. The entire body feels its revitalizing effects. Calcatine is especially beneficial and a valuable remedy in anemia, tuberculosis, all chronic or wasting diseases, swollen glands, ulcers, headaches, too rapid decay of the teeth, pimples, neuralgic rheumatism, prevents gall-stones, acidosis, Bright's disease, goitre, pancreatic diseases, etc. Calcatine is not a medicine but a valuable tissue and cell salts. $1.00 per bottle, six bottles for $5.00." (Govt. Ex. 11, p. 259; Tr., pp. 78-9).

The falsity of these representations appears from the testimony of Drs. Thienes, West, Moody and Clark, hereinbefore referred to.

> "Where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable in many cases to establish such intent or motive; for a single act, taken by itself, may not be decisive either way, but, when taken in connection with others of a like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty."

The above is the language of the Supreme Court of the United States in *Wood v. United States*, 16 Pet. 358.

In the case of *Williamson v. United States*, 207 U. S. 425, 451, where the defendant was charged with conspiring to commit subornation of perjury in proceedings for

the purchase of public lands under the authority of the Timber and Stone Act, in procuring certain persons to make oath before a United States Commissioner that the lands were being purchased for the exclusive use and benefit of such persons, respectively, when in fact the titles acquired were to inure to the benefit of defendant and others, the trial court admitted evidence of the acquisition by like wrongful methods of state school lands located near the Government timber lands in question. The Supreme Court said:

> "* * * the testimony as to * * * an attempt to acquire and the acquisition of state school lands was, we think, * * * competent as tending to establish on the part of the conspirator guilty intent, purpose, design or knowledge.
>
> "The contention that the proof on the subjects just stated should not have been admitted, because it tended to show the commission of crimes other than those charged in the indictment, and consequently must have operated to prejudice the accused, is, we think, without merit, particularly as the trial judge, in his charge to the jury, carefully limited the application of the testimony so as to prevent any improper use thereof.
>
> "The conclusion above expressed as to the admissibility of the evidence objected to is elucidated by *Holmes v. Goldsmith*, 147 U. S. 150, 164, where it was said:
>
> "'As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting,

> the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be. "The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth."
>
> " 'The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused.' "

In a prosecution for unlawfully using the mails for circulating certain seditious and anarchistic matter, and for conspiracy to commit such offenses, this court held that other matter consisting of a speech of one of the defendants and a letter published in his paper, unquestionably seditious and anarchistic, were admissible on the question of intent; and, speaking through Judge Ross, said:

> "We think it does not admit of doubt that both the speech and the letter were properly admitted in evidence, as bearing on the intent with which the plaintiff in error Magon published and the other plaintiff in error aided him in depositing the publication in the mail."
>
> *Magon v. United States,* 260 Fed. 811, 814.

On a trial for conspiracy to violate the Food and Drugs Act by shipping misbranded coffee, where the defendant denied knowledge of the misbranding, the Court of Appeals, Second Circuit, held that warehouse orders passing through defendant's office and directing the misbranding of other lots of coffee were properly introduced in evidence as tending to show his knowledge; and cited *Wood v. United States* and *Williamson v. United States, supra,* in support thereof.

Mitchell v. United States, 229 Fed. 357, 361.

In her literature appellant also made the following statements:

> "The diseases caused by disfunction of the liver are many and varied. What is acidosis? One of the ailments arising from a disfunction of the pancreas is that fatal and insidious disease, diabetes. One would never have tuberculosis or anemia if the spleen remained healthy. In cases of diabetes and anemia, the patient does not suspect there is anything wrong until he is in a most serious condition." (Govt. Ex. 10, p. 18; Tr., p. 42.)

> "The Curse of the World—Acidosis.

> "Acidosis spells disease, old age and death. It is the grim reaper's most effective weapon. Premature old age and ill health are brought about by acidosis, which changes the chemical elements or hormones of the internal secretions of the glands that govern the processes of metabolism. These glands are the parathyroids, thyroid, testicles, ovaries, adrenals and the pituitary body." (Govt. Ex. 11, p. 170; Tr., p. 78.)

These statements likewise are evidence bearing upon appellant's fraudulent intent. They go to indicate that she possessed no medical knowledge sufficient to warrant her in making claims as to the therapeutic value of the articles she shipped, and therefore that the statements on the labels were made by her in reckless and wanton disregard of their truth or falsity.

The term "fraudulent" includes false statements made in such disregard of their truth or falsity. In *Cooper v. Schlesinger,* 111 U. S. 148, 155, an action for goods sold where the defense of fraud was set up, the Supreme Court approved an instruction of the trial court "that a statement recklessly made, without knowledge of its truth, was a false statement knowingly made."

Upon the authority of *Cooper v. Schlesinger,* this principle has been applied in prosecutions under the Food and Drugs Act.

Eleven Gross Packages, etc., v. United States, (C. C. A. 3) 233 Fed. 71, 74;

United States v. 17 Bottles, etc., (D. C., D. Md.), 55 F. (2d) 264.

As to the duty of the court to instruct the jury that the object and bearing upon the case of the statements in the collateral advertising were limited to the question of intent; only excerpts from the court's instructions are contained in the Bill of Exceptions (Tr., pp. 204-8, 217), but from these it appears that the jury were so instructed, at least, inferentially. It is shown that the court instructed that in order to justify a conviction, the

jury must find that the statements upon the labels were both false and fraudulent and were put there "to accompany the goods with actual intent to deceive. An intent which may be derived from the facts and circumstances, but which must be established beyond a reasonable doubt." (Tr., p. 206.) And also, that if the jury honestly entertained a belief that the defendant might be innocent of "the charge against her," she was entitled to the benefit of that doubt and should be acquitted. (Tr., p. 207.)

What else the court charged is not shown; and it is therefore to be presumed that the jury was properly instructed.

5 *Cyc. Fed. Pro.* Sec. 2367.

Also, although the court specifically gave her the opportunity (Tr., p. 207), appellant requested no further instruction upon the point (Tr., p. 207, p. 216, lines 17-18), so she cannot now complain.

Hallowell v. United States (C. C. A. 9), 253 Fed. 865, 867, certiorari denied 249 U. S. 615;

Great New York Line Poultry Chamber of Commerce v. United States, (C. C. A. 2), 47 F. (2d) 156, 159, certiorari denied 283 U. S. 837.

By Assignment of Error 31, appearing under the heading aforesaid, "Specification I" (App. Br., p. 46), appellant argues that the court erred in permitting Mr. Larrick to testify as to the contents of certain printed matter submitted by appellant to the Food and Drug Department in the year 1928, concerning Alberty's Calcatine.

The witness had testified that on August 4, 1928, a letter was addressed by the Department to appellant commenting on printed matter she had submitted, containing representations about Calcatine, which letter contained this statement:

> "With reference to your request that the Administraction blue-pencil the particular words in your printed matter which are regarded as objectionable, such a procedure is hardly practicable. The character of the wording is objectionable practically as a whole." (Tr., p. 156.)

The representations in such printed matter made by appellant about Calcatine (Tr., pp. 164-5) were similar to those afterwards made by her on the labels involved in the instant action. The witness' testimony was cogent evidence that appellant made the later misrepresentations with knowledge of their false character.

Reply to Argument That Conduct of Government Counsel Was Prejudicial

Specification II of appellant's brief covers Assignments 44, 45, 46, 26, 27 and 28, relating to claimed misconduct on the part of the Government counsel. (App. Br., pp. 52-9.)

By Assignment 44, objection is now made to the following cross-examination of appellant:

> "Q. Now, Mrs. Alberty, I will ask you if you don't know it to be a fact, after you came to Los Angeles and the Alberty's Foods were distributed to

infants here, that dozens upon dozens of babies were taken to the then City Health Department right across the street from this building and there had to be treated as a result of taking Alberty's Food?

"A. Absolutely no. I never even heard of it.

"Q. Because of the condition of their stomachs, vomiting profusely and other things? Do you not know that to be a fact?

"A. I do not, because I offered $100 for any baby that has never gained. I never had anybody come forward to get or claim that $100." (Tr., p. 202.)

No objection was made to the questions when asked, and no exception was taken. (Tr., id.) The cross-examination was proper; the questions were upon the subject of the efficacy of Alberty's Food, a matter specifically testified to by appellant in her direct examination as supporting her claim to have at all times acted in good faith in dealing in her various products.

Upon her examination in chief she testified:

"I have seven children of my own. I started in manufacturing my products after my first bottle baby died of malnutrition. My second baby was given up to die, and in the meantime, between the death of the first and the one given up to die, I had taken up the study of infants' feeding. I got all the books on infant feeding I could find. I sent to Washington, D. C., and got all the pamphlets they had ever issued. I had a lot of experience being a nurse on infant cases. All this was a number of years ago at Canyon City, Colorado. My first product was used

on my son, Louis Alberty. He was the one who survived following the one that died. Thereafter, in Seattle, Washington, I started manufacturing my products commercially. Dr. McCauley of North Yakima, Washington, gave a child up to die, and my mother knew its mother, so the woman was induced to bring the child to me, in a dying condition. She brought the baby to me at my home. Every morning she brought the baby to me and took it away in the evening. In the first week the baby gained 2½ pounds. She stayed with me about a month and when the mother left she came to me—(at this point the defendant broke down and stated she could not talk any more about the babies). (Tr., p. 186.)

"After that, I went to the Seattle Star and told the editor I had a food that would save babies' lives, so he gave me a write-up five inches long to tell about it. From that I received 25 babies to care for. All had been under a physician's care, every one given up to die, in the last stages of malnutrition. I was able to save all but one. I wrote the history of each baby, with the doctor's name, what the doctor said, and also the telephone number. Then I went down to see Joseph Blethen, editor of the Seattle Times. I gave him the list and told him, 'I would like for him to give me a write-up' because I really was interested in saving babies' lives. He called me two days later and told me to come down, he wanted to talk to me. He was not very courteous—in fact, very abrupt. He told me he had investigated every testimonial; that he and his stenographer had spent the day before that calling the people up; he asked me what I wanted, and I told him I wanted a little write-up. He gave me that and refused pay. (Tr., pp. 186-7.)

"Thereafter I took my formulas to various doctors in Seattle and asked if they would prescribe it. They refused, so I told them I would have to go to the laity because I felt it was my work in life to help sick babies. Joseph Blethen gave me all the advertising I wanted without charge. I took care of babies in my home sent to me by various doctors. Some had brain fever, almost everything you could think of—rickets and indigestion and eczema and everything else. Finally I had 150 babies under my care at one time, mothers calling me all hours of the day and night. I got so I couldn't stand it. I left and came to California, doing that two or three times, finally opening an office in the Pioneer Building in Seattle. Thereafter I came to California in 1920. I gave these babies some of them Dr. Russell's food, some of them Alberty's Food. Some I gave a form of hypophosphates. Before coming to me some of the babies had tried everything, even mother's milk, but none of them left me that couldn't assimilate and take care of and digest milk. I offered $100 for every baby who never gained an ounce the first 24 hours on Alberty's Food." (Tr., p. 187.)

"When the plaintiff in error offered himself as a witness, he subjected himself to the rules applicable to all witnesses, and he was subject to cross-examination as to any matter which he had testified to on his direct examination, or which was germane thereto."

Smith v. United States (C. C. A. 9) 10 F. (2d) 787.

Appellant has no warrant for saying that Government counsel did not ask the questions on cross-examination in

good faith, as shown by the failure to rebut appellant's denials. The matter being collateral, counsel was bound by the answers of the witness.

It is believed unnecessary to answer the argument based on Assignments of Error 45 and 46 (App. Br., pp. 53-4), inasmuch as the parts of the cross-examination of appellant referred to in said assignments are not contained in the Bill of Exceptions (Tr., p. 202).

Assignment 26 is based upon the cross-examination of defendant's witness, George Hyland, a pharmacist who sold appellant the homeopathic remedy marketed by her as Alberty's Liver Cell Salts (Tr., p. 142). No exception was taken by appellant to the court's overruling her objection to the question asked (Tr., p. 141), so that a review on appeal is not warranted. It was elicited by the cross-examination that the witness was a defendant in an information filed involving the same product (Tr., pp. 140-2). Such evidence went to the question of the interest and bias of the witness.

The first paragraph of Assignment 27 (App. Br., p. 56) is based upon claimed occurrences which are not contained in the Bill of Exceptions.

The remaining paragraphs of Assignment 27 and the whole of Assignment 28 (App. Br., pp. 56-8) involve questions asked on cross-examination of two of appellant's witnesses upon the matter of whether or not appellant made a large profit from dealing in Calcatine and Liver Cell Salts. Objections to these questions were sustained (Tr., pp. 142, 146), so it does not appear that appellants should be heard to complain. No improper

inference could have followed from the asking of the questions, because they were proper. The desire to obtain the money to be had by selling the drugs was a motive for knowingly misrepresenting their therapeutic effects. The court instructed:

> "The element of profit is, in a sense, a false element in as far as the offense itself is concerned. It is not an element at all and you are not to be governed in your judgment by the fact that the defendant made money out of it. However, the fact that it was highly profitable might furnish a motive for the defendant to do what otherwise she might not have done. To that extent it may properly be taken into consideration by the jury." (Tr., p. 207.)

Reply to Argument That Conduct and Instructions of Court Were Prejudicial

Specification III assigns by Assignments 20, 29, 30, 51, 56, 57 and 34 that particular acts, conduct and instructions of the trial judge were prejudicial (App. Br., pp. 59-68).

Assignment 20 (App. Br., p. 59) refers to colloquy between the court and counsel not contained in the Bill of Exceptions.

Assignment 21 (App. Br., pp. 59-60) refers to colloquy not contained in the Bill of Exceptions (Tr., pp. 134-5), and concerns the admissibility of some photographs of a baby. It does appear in the Bill of Exceptions (Tr., id.) that a representative of appellant testified that pictures of a baby for whom Calcatine had been sent, and an

accompanying letter, were received by a store employee; and that the court sustained an objection to the introduction of the pictures and the letter in evidence. The ruling was proper, since there was no evidence that appellant had relied on the pictures or letter (*McLean Medicine Co. v. United States,* 253 Fed. 694.) The witness later testified that she showed them to appellant, but their offer in evidence was not renewed (Tr., p. 135).

Assignment 30 (App. Br., p. 61) refers to colloquy not contained in the Bill of Exceptions.

Assignment 51 (App. Br., p. 62) refers to a statement of the court not contained in the Bill of Exceptions.

Assignment 56 (App. Br., p. 63) refers to an instruction not contained in the Bill of Exceptions.

Assignment 57 (App. Br., p. 64) refers to a charge of the court concerning the origin of the Food and Drugs Act. No objection was made to the charge when given and no exception was taken, although at the close of the instructions the trial judge asked counsel if there were any exceptions on behalf of the defendant (Tr., pp. 207-8).

A reading of the instruction shows it to be a proper one.

Assignment 34 (App. Br., p. 65) assigns as error the conduct of the court in limiting the testimony of a testimonial witness for appellant in a recitation of her claimed ailments, to a period of time commencing in the year 1925 (Tr., pp. 181-3). The act of the trial judge was but the

proper exercise of his duty to avoid undue prolongation of the trial.

Kettenbach v. United States (C. C. A. 9), 202 Fed. 377, 385, certiorari denied 229 U. S. 613.

Assignment 55, under the heading "Specification IV" (App. Br., p. 68), is based on a charge given when the jury, after having retired, had returned for further instructions. No exception was attempted to be taken to the instruction until after the jury had again retired (Tr., p. 213). In answer to the query of the jury as to whether the labels involved in counts 3, 4, 5, 6 and 7, were revised labels applied to products seized and later released by the Government, the court correctly stated that they were not, and properly charged as follows:

> "That procedure is this: Whenever goods are seized, at least goods of this character, if the matter is contested the defendant in the case is tried on the same issues as we try this one, as to whether or not it violates the Act. Then if the judgment is in favor of the defendant, of course that settles it. The goods must be restored. If the judgment is in favor of the Government, there is a procedure, and the law permits that, under which the defendant may, by going through certain formalities, take the goods and re-label them, correctly label them. (Tr., p. 208.)
>
> "Now, in this case, naturally, the first stage of the proceeding was reached only—and I think I am correct in saying this—that there was no re-labeling. That is, these goods involved in this suit were not released to the defendant. (Tr., p. 208.)

"Mr. Kellogg: Yes, your Honor, the evidence shows that they were. (Tr., p. 208.)

"The Court: Whether they were or not is a matter of no importance in this case at all. What happened subsequent to their seizure is of no importance in the case at all. The labels mentioned, that you are inquiring about, were the ones that were on at the time—that were on the goods at the time of the seizure, and are not ones that were put on later. In other words, they were not revised labels." (Tr., p. 209.)

It is plain that the court's language, "What happened subsequent to their (the goods') seizure is of no importance in the case at all," has reference simply to any court proceeding by which the goods, following seizure, may have been released upon re-labelling. Appellant's argument in which she assumes the language to have a different meaning, does not call for reply.

Assignment 23, under the heading "Specification VII" (App. Br., p. 73), concerns a statement of the court not contained in the Bill of Exceptions.

Reply to Argument That Court Erred in Allowing Literature in Evidence Upon Cross-Examination of Witness for Appellant.

Assignment 22, under Specification V (App. Br., p. 70), and Assignments 24 and 25, under Specification VII (App. Br., pp. 73-4), are each based upon the reception in evidence during cross-examination of appellant's witness, Beatrice Lyon, of a statement about Ca-Mo, form-

erly Calcatine, from a book, "Calcium, The Staff of Life, by Adah Alberty"; and upon the admission in evidence of a pamphlet entitled, "Alberty's Treatment for Diabetes." (Govt. Ex. 13).

The witness testified in her examination in chief that she was then a representative of Mrs. Alberty at the Broadway Department Store, and had been employed as such for three years, selling Mrs. Alberty's products; that she had sold Calcatine until eighteen months or a year previously, and that then she commenced to sell, and at the time of trial was selling, the same product under the name of Ca-Mo; that she also was selling Lebara Salts, and had previously sold such drug under its former name of Liver Cell Salts; that she also was selling Alberty's anti-diabetic preparation (Tr., pp. 132-3); that she did not and never had told customers that these drugs were remedies or preparations for the cure of anything (Tr., p. 133).

Upon cross-examination, the witness testified that she had Alberty literature in her department for distribution, and had in the store the book and pamphlet aforesaid; that she made no representations to customers about the value of the products (Tr., p. 135); that Government's Exhibit 13 was for distribution in her department in connection with the sale of products; that it was in the department under the sign, "Take one" (Tr., p. 138).

Upon re-direct examination she testified that sometimes she suggested to customers that they take a book with them to read; that such was all within the last three years (Tr., p. 139).

She thereupon testified upon cross-examination that this literature had been used at the Broadway and sold right down to the present. (Tr., p. 139.)

The objection is made by appellant that the cross-examination was improper because it concerned the use of the literature subsequent to the times of the offenses charged; and that the literature was improperly admitted in evidence.

The witness having testified that during the time to which objection is made, she did not represent the articles to be curative, the court correctly exercised its discretion in permitting appellee to introduce evidence that in fact during such period the witness distributed literature containing representations concerning the therapeutic and curative value of the drugs.

Appellant having introduced immaterial evidence cannot complain that appellee rebutted it by cross-examination relating to the matter. Also, the cross-examination and literature which she admitted having distributed were properly allowed to contradict and impeach her testimony.

Reply to Argument That Court Improperly Awarded Costs of Suit to Appellee

In Specification VI, Assignment 60 (App. Br., p. 72), appellant feels aggrieved that the court imposed a sentence following her conviction by a jury, and in particular objects to being subjected to the payment of the costs of prosecution. The award that the defendant should pay

the costs was pursuant to statute. (28 *U. S. C.*, Sec. 821.)

Conclusion

It is respectfully submitted that the verdict and judgment are just, and that no ground exists for a reversal thereof.

Respectfully submitted,

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